City of Lafayette Staff Report

For: City Council

By: Tony Coe, Engineering Services Manager

Date Written: February 12, 2009

Meeting Date: February 23, 2009

Subject: MS 504-06, 3975 S. Peardale Drive- Partial Release of Security

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Introduction

A two-lot subdivision was approved by the City Council at this property in May 2008. The applicant posted a cash security to guarantee performance and payment for subdivision improvements. The applicant has completed a portion of the improvements and is requesting a partial release of security.

Discussion

The improvements include drainage work on site, installation of a fire hydrant, and minor widening of a driveway. The City is holding cash in the amount of $26,100 to guarantee performance and payment for the improvements. The applicant has completed all the drainage work, which has been inspected and accepted under a permit by the Contra Costa County Grading Inspection Department. Separately, the applicant has agreed to execute a Deferred Improvement Agreement for the installation of a fire hydrant, which is not a public or common improvement to the subdivision, but would only be needed if building occurs on the newly created lot. The applicant wishes to have the agreement approved and the completed work acknowledged by the City so that he may have the security reduced accordingly. Typically security is not released until the time of completion of all subdivision improvements. However, given the current economic climate, staff supports the applicant's request to obtain a partial release.

The cash security will be reduced in the following manner pending the City Council's acceptance of the completed work:

Value of completed work:	$15,100
Maintenance security for completed work to be withheld for 1 ear from acceptance (15% of Value)	$ 2,265
Payment security for completed work to be withheld for 6 months from acceptance (50% of Value)	$ 7,550
Subtotal of withholding for completed work	$ 9,815
Withholding for driveway widening (performance and payment security)	$ 3,450
Total of all withholding	$13,265
Cash security on file	$26,100
Security to be refunded upon acceptance	$12,835

Recommendation

City Council approves Deferred Improvement Agreement and authorizes its execution, accepts work done to date as complete and authorizes the recordation of a notice of partial completion and the release of corresponding securities.

RECORDED AT THE REQUEST OF
AND RETURN TO:

City of Lafayette
Engineering Services Division
3675 Mt. Diablo Boulevard, Suite 210
Lafayette, California 94549
Attn: City Engineer

[EXEMPT FROM RECORDING FEE PER GOV. CODE, § 27383]
SPACE ABOVE FOR RECORDER'S USE ONLY

DEFERRED IMPROVEMENT AGREEMENT

This Deferred Improvement Agreement is entered into as of this _____ day of _____, 2009, by and between the City of Lafayette, a municipal corporation ("City") and Ellsworth A. Cragholm, Jr. and Stacia H. Cragholm (collectively, "Owner"). City and Owner are sometimes hereinafter individually referred to as "Party" and hereinafter collectively referred to as the "Parties".

RECITALS

A. Owner owns certain real property more commonly known as 3975 South Peardale Drive, Lafayette, California, Assessor Parcel Number 248-051-007 and more specifically described in Exhibit "A" attached hereto and incorporated herein by reference ("Property").

B. On July 19, 2007, the City of Lafayette Planning Commission approved MS504-06 for the subdivision of one lot into two lots subject to certain conditions, of which the Property is one of the two lots.

C. Condition of approval to MS504-06 21(a) requires the developer to provide an adequate and reliable water supply for fire protection with a minimum fire flow of 1,000 gallons per minute for the Property. Required flow shall be delivered from not more than one hydrant flowing for a duration of 120 minutes while maintaining 20 pounds of residual pressure in the main as described in more detail in Exhibit "B" attached hereto and incorporated herein by reference ("Improvement") prior to issuance of a building permit for Parcel A as shown on Exhibit "B" or as otherwise required in Section 1 of this Agreement.

D. The City and Owner are willing to agree to a deferral of this Improvement in accordance with the terms and conditions hereafter set forth.

TERMS AND CONDITIONS

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual covenants contained in this Agreement the Parties agree as follows:

1. Improvement. Owner shall install or have installed at its own costs, expense, and liability the Improvement on the Property. The installation of the Improvement shall be deferred until the City Engineer determines that there is no further reason to defer installation of the Improvement because its installation is necessary for the public health, welfare and safety or is necessary for the orderly development of the surrounding area. In no event shall the installation of the Improvement commence later than July 1, 2018, unless the Parties mutually agree to amend this Agreement. Owner agrees to begin installation of the Improvement upon issuance of a building permit for development of the Property and shall notify the City at least 48 hours before starting work.

1.1 Permits; Notices. Prior to commencing any work, Owner shall, at its sole cost, expense, and liability, obtain all necessary permits and licenses and give all necessary and incidental notices required for the lawful installation of the Improvement and performance of Owner's obligations under this Agreement. Owner shall conduct the work in full compliance with the regulations, rules, and other requirements contained in any permit or license issued to Owner.

1.2 Pre-approval of Plans and Specifications. Owner is prohibited from commencing work on the Improvement until all plans and specifications for such Improvement have been submitted to and approved by the City Engineer, or his or her designee. Approval by the City Engineer shall not relieve Owner from ensuring that the Improvement conforms to all other requirements and standards set forth in this Agreement.

1.3 Quality of Work; Compliance With Laws and Codes. The installation plans and specifications for the Improvement shall be prepared in accordance with all applicable federal, state and local laws, ordinances, regulations, codes, standards, and other requirements. The Improvement shall be installed in accordance with all approved maps, plans, specifications, standard drawings, and special amendments thereto on file with City, as well as all applicable federal, state, and local laws, ordinances, regulations, codes, standards, and other requirements applicable at the time work is actually commenced.

1.4 Standard of Performance. Owner and its contractors, if any, shall perform all work required to install the Improvement under this Agreement in a skillful and workmanlike manner, and consistent with the standards generally recognized as being employed by professionals in the same discipline in the State of California. Owner represents and maintains that it or its contractors shall be skilled in the professional calling necessary to perform the work. Owner warrants that all of its employees and contractors shall have sufficient skill and experience to perform the work assigned to them, and that they shall have all licenses, permits, qualifications and approvals of whatever nature that are legally required to install the Improvement, and that such licenses, permits, qualifications and approvals shall be maintained throughout the term of this Agreement.

1.5 Fees and Charges. Owner shall, at its sole cost, expense, and liability, pay all fees, charges, and taxes arising out of installation of the Improvement, including, but not limited to, all plan check, design review, engineering, inspection, and other service fees, and any impact or connection fees established by City ordinance, resolution, regulation, or policy.

1.6 City Inspection of Improvement. Owner shall, at its sole cost, expense, and liability, and at all times during installation of the Improvement, maintain reasonable and safe facilities and provide safe access for inspection by City and Contra Costa Fire District or East Bay Municipal Utility District ("EBMUD") of the Improvement and areas where installation of the Improvement is occurring or will occur.

2. Default; Notice; Remedies.

2.1 Notice. If Owner neglects, refuses, or fails to fulfill or timely complete any obligation, term, or condition of this Agreement, or if City determines there is a violation of any federal, state, or local law, ordinance, regulation, code, standard, or other requirement, City may at any time thereafter declare Owner to be in default or violation of this Agreement and make written demand upon Owner or its surety, or both, to immediately remedy the default or violation ("Notice"). Owner shall substantially commence the work required to remedy the default or violation within ten (10) days of the Notice. If the default or violation constitutes an immediate threat to the public health, safety, or welfare, City may provide the Notice verbally, and Owner shall substantially commence the required work within twenty-four (24) hours thereof. Immediately upon City's issuance of the Notice, Owner and its surety shall be liable to City for all costs of installation of the Improvement and all other administrative costs expenses as provided for in Section 3 of this Agreement.

2.2 Failure to Remedy; City Action. If the work required to remedy the noticed default or violation is not diligently prosecuted to a completion acceptable to City within the time frame contained in the Notice, City may complete all remaining work, arrange for the completion of all remaining work, and/or conduct such remedial activity as in its sole and absolute discretion it believes is required to remedy the default or violation. All such work or remedial activity shall be at the sole and absolute cost, expense, and liability of Owner and its surety, without the necessity of giving any further notice to Owner or surety. City's right to take such actions shall in no way be limited by the fact that Owner or its surety may have constructed any, or none of the required or agreed upon Improvement at the time of City's demand for performance. In the event City elects to complete or arrange for completion of the remaining work and installation of the Improvement, City may require all work by Owner or its surety to cease in order to allow adequate coordination by City. If the City elects to complete or arrange for the installation of the Improvement, the City may place a lien on the Property for the cost of such work. If City sues to compel performance of this Agreement, to recover the cost of installing the Improvement or to enforce the lien, Owner shall pay all reasonable attorney's fees, costs of suit and all other expenses incurred by City in connection therewith, and the attorney's fees, costs and other expenses shall also become a lien on the Property.

2.3 Other Remedies. No action by City pursuant to Section 2.0 et seq. of this Agreement shall prohibit City from exercising any other right or pursuing any other legal or equitable remedy available under this Agreement or any federal, state, or local law. City may exercise its rights and remedies independently or cumulatively, and City may pursue inconsistent remedies. City may institute an action for damages, injunctive relief, or specific performance.

3. Administrative Costs. If Owner fails to install all or any part of the Improvement within the time required by this Agreement, or if Owner fails to comply with any other

obligation contained herein, Owner and its Surety shall be jointly and severally liable to City for all administrative expenses, fees, and costs, including reasonable attorney's fees and costs, incurred in obtaining compliance with this Agreement or in processing any legal action or for any other remedies permitted by law.

4. Approval of Improvement. If the Improvement is properly installed by Owner and if it complies with all applicable federal, state and local laws, ordinances, regulations, codes, standards, and other requirements, the City Engineer shall approve the installation of the Improvement. In addition, Owner shall cause Improvement to be inspected and accepted by EBMUD, which has jurisdiction over said Improvement.

5. Warranty and Guarantee. Owner hereby warrants and guarantees the Improvement against any defective work or labor done, or defective materials furnished in the performance of this Agreement for a period of one (1) year following completion of the work and acceptance by City and EBMUD ("Warranty"). During the Warranty, Owner shall repair, replace, or reconstruct any defective or otherwise unsatisfactory portion of the Improvement, in accordance with the current ordinances, resolutions, regulations, codes, standards, or other requirements of City, and to the approval of the City Engineer and EBMUD. All repairs, replacements, or reconstruction during the Warranty shall be at the sole cost, expense, and liability of Owner and its surety. As to any which has been repaired, replaced, or reconstructed during the Warranty, Owner and its surety hereby agree to extend the Warranty for an additional one (1) year period following City's and EBMUD's acceptance of the repaired, replaced, or reconstructed Improvement. Nothing herein shall relieve Owner from any other liability it may have under federal, state, or local law to repair, replace, or reconstruct any Improvement following expiration of the Warranty or any extension thereof. Owner's warranty obligation under this section shall survive the expiration or termination of this Agreement.

6. Insurance. Owner shall procure and maintain, and shall require its contractor to procure and maintain, during installation of the Improvement called for in this Agreement a separate policy of insurance in a form and amount acceptable to City and from an acceptable carrier to the City.

7. Indemnity. Owner shall defend, indemnify, and hold harmless City, its elected officials, officers, employees, and agents from any and all actual or alleged claims, demands, causes of action, liability, loss, damage, or injury, to property or persons, including wrongful death, whether imposed by a court of law or by administrative action of any federal, state, or local governmental body or agency, arising out of or incident to any acts, omissions, negligence, or willful misconduct of Owner, its personnel, employees, agents, or contractors in connection with or arising out of installation of the Improvement, or performance of this Agreement. This indemnification includes, without limitation, the payment of all penalties, fines, judgments, awards, decrees, attorneys fees, and related costs or expenses, and the reimbursement of City, its elected officials, officers, employees, and/or agents for all legal expenses and costs incurred by each of them. This indemnification excludes only such portion of any claim, demand, cause of action, liability, loss, damage, penalty, fine, or injury, to property or persons, including wrongful death, which is caused solely and exclusively by the negligence or willful misconduct of Agency as determined by a court or administrative body of competent jurisdiction. Owner's obligation to indemnify shall survive the expiration or termination of this Agreement, and shall not be

restricted to insurance proceeds, if any, received by City, its elected officials, officers, employees, or agents.

8. Relationship Between the Parties. The Parties hereby mutually agree that neither this Agreement, nor any other related entitlement, permit, or approval issued by City for the Property shall operate to create the relationship of partnership, joint venture, or agency between City and Owner. Owner's contractors and subcontractors are exclusively and solely under the control and dominion of Owner. Nothing herein shall be deemed to make Owner or its contractors an agent or contractor of City

9. Authority to Enter Agreement. Each Party warrants that the individuals who have signed this Agreement have the legal power, right, and authority to make this Agreement and bind each respective Party.

10. Cooperation; Further Acts. The Parties shall fully cooperate with one another, and shall take any additional acts or sign any additional documents as may be necessary, appropriate, or convenient to attain the purposes of this Agreement.

11 Construction; References; Captions. It being agreed the Parties or their agents have participated in the preparation of this Agreement, the language of this Agreement shall be construed simply, according to its fair meaning, and not strictly for or against any Party. Any term referencing time, days, or period for performance shall be deemed calendar days and not work days. All references to Owner include all personnel, employees, agents, and subcontractors of Owner, except as otherwise specified in this Agreement. All references to City include its elected officials, officers, employees, agents, and volunteers except as otherwise specified in this Agreement. The captions of the various articles and paragraphs are for convenience and ease of reference only, and do not define, limit, augment, or describe the scope, content, or intent of this Agreement.

12. Notices. All notices, demands, invoices, and written communications shall be in writing and delivered to the following addresses or such other addresses as the Parties may designate by written notice:

CITY:	**OWNER:**
City of Lafayette 3675 Mt. Diablo Blvd. #210 Lafayette, California 94549 Attn: City Engineer	Ellsworth A. Cragholm, Jr. Stacia H. Cragholm 3975 South Peardale Drive Lafayette, California 94549

Depending upon the method of transmittal, notice shall be deemed received as follows: by facsimile, as of the date and time sent; by messenger, as of the date delivered; and by U.S. Mail first class postage prepaid, as of 72 hours after deposit in the U.S. Mail.

13. Amendment; Modification. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing and signed by both Parties.

14. Waiver. City's failure to insist upon strict compliance with any provision of this Agreement or to exercise any right or privilege provided herein, or City's waiver of any breach of this Agreement, shall not relieve Owner of any of its obligations under this Agreement, whether of the same or similar type. The foregoing shall be true whether City's actions are intentional or unintentional. Owner agrees to waive, as a defense, counterclaim or set off, any and all defects, irregularities or deficiencies in the authorization, execution or performance of the Improvement or this Agreement, as well as the laws, rules, regulations, ordinances or resolutions of City with regards to the authorization, execution or performance of the Improvement or this Agreement.

15. Assignment or Transfer of Agreement. Owner shall not assign, hypothecate, or transfer, either directly or by operation of law, this Agreement or any interest herein without prior written consent of City. Any attempt to do so shall be null and void, and any assignee, hypothecatee, or transferee shall acquire no right or interest by reason of such attempted assignment, hypothecation, or transfer. Unless specifically stated to the contrary in City's written consent, any assignment, hypothecation, or transfer shall not release or discharge Owner from any duty or responsibility under this Agreement.

16. Binding Effect. Each and all of the covenants and conditions shall be binding on and shall inure to the benefit of the Parties, and their successors, heirs, personal representatives, or assigns. This section shall not be construed as an authorization for any Party to assign any right or obligation.

17. No Third Party Beneficiaries. There are no intended third party beneficiaries of any right or obligation assumed by the Parties.

18. Invalidity; Severability. If any portion of this Agreement is declared invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions shall continue in full force and effect.

19. Consent to Jurisdiction and Venue. This Agreement shall be construed in accordance with and governed by the laws of the State of California. Any legal action or proceeding brought to interpret or enforce this Agreement, or which in any way arises out of the Parties' activities undertaken pursuant to this Agreement, shall be filed and prosecuted in the appropriate California State Court in the County of Contra Costa, California. Each Party waives the benefit of any provision of state or federal law providing for a change of venue to any other court or jurisdiction including, without limitation, a change of venue based on the fact that a governmental entity is a party to the action or proceeding, or that a federal right or question is involved or alleged to be involved in the action or proceeding. Without limiting the generality of the foregoing waiver, Owner expressly waives any right to have venue transferred pursuant to California Code of Civil Procedure Section 394.

20. Attorneys' Fees and Costs. If any arbitration, lawsuit, or other legal action or proceeding is brought by one Party against the other Party in connection with this Agreement or the Property, the prevailing party, whether by final judgment or arbitration award, shall be entitled to and recover from the other party all costs and expenses incurred by the prevailing party, including actual attorneys' fees ("Costs"). Any judgment, order, or award entered in such

legal action or proceeding shall contain a specific provision providing for the recovery of Costs, which shall include, without limitation, attorneys' and experts' fees, costs and expenses incurred in the following: (a) post judgment motions and appeals, (b) contempt proceedings, (c) garnishment, levy, and debtor and third party examination, (d) discovery, and (e) bankruptcy litigation. This section shall survive the termination or expiration of this Agreement.

21. Counterparts. This Agreement may be executed in counterpart originals, which taken together, shall constitute one and the same instrument.

IN WITNESS WHEREOF, the representatives of the parties hereto have executed this Deferred Improvement Agreement as of the date first above written.

CITY:

CITY OF LAFAYETTE

_____
Don Tatzin, Mayor

ATTEST:

_____
Joanne Robbins, City Clerk

OWNER:

_____
Ellsworth A. Cragholm, Jr.

_____
Stacia H. Cragholm

(Note: Owners' signatures must be notarized and must exactly match as displayed above.)

Insert Acknowledgment Here

Exhibit A
Legal Description for Parcel A of MS504-06

Provide an electronic copy to be inserted here.

Exhibit B
Parcel Map and Improvement